No. 80-620

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN H. AYOOB, et al.,

Petitioners,

v.

PATRICIA MORRISON, et al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF FOR THE PENNSYLVANIA BAR ASSOCIATION AS AMICUS CURIAE

Counsel of Record:
Charles C. Keller, Esq.
Peacock, Keller, Yohe, Day & Ecker
70 East Beau Street
Washington, Pennsylvania 15301

Attorneys for the
Pennsylvania Bar Association

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Pennsylvania Bar Association hereby moves for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. The consent of Petitioner's counsel has been obtained and lodged with the Court. The consent of counsel for Respondents was requested but withheld.

The Pennsylvania Bar Association is a non-profit corporation founded in 1895 which represents more than twenty thousand lawyers. Since its inception the Association has been active in expressing and implementing considered views on local, state and national matters affecting the judiciary. The Association pioneered an effective disciplinary system for both lawyers and judges. The Association's long-standing and widely recognized role relative to judicial issues generally, and such specific issues as judicial merit selection and retention,

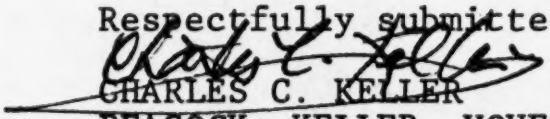
attests to its commitment to maintaining the integrity and independence of the judiciary.

As a consequence, the Association wishes to address the issue of whether the common law doctrine of judicial immunity bars an award of attorney's fees against judicial officers or related state and local agencies. While Petitioners have ably addressed many facets of this issue as applied to the specific facts of their own case, the Association proposes to address this issue in a more generic fashion stressing policy considerations applicable to the entire judiciary. Moreover, while avoiding redundancy, the Association nevertheless hopes to set forth many arguments not addressed or fully developed by the Petitioners.

In summary, the Association believes that its contribution will assist the Court in resolving this complex and weighty issue. The Pennsylvania Bar Association

therefore respectfully prays that its motion for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari be granted.

Respectfully submitted,



CHARLES C. KELLER
PEACOCK, KELLER, YOHE,
DAY & ECKER
70 East Beau Street
Washington, PA 15301
Attorneys for Pennsylvania
Bar Association

INTEREST OF THE PENNSYLVANIA BAR ASSOCIATION

Every practitioner of law, indeed every citizen, has a deep and abiding concern in the integrity and independence of the judiciary. Representing over twenty thousand lawyers, the Pennsylvania Bar Association has repeatedly demonstrated this concern by addressing actions or decisions which may undermine this independence.

The Association believes that if judicial officers or related state and local agencies are held liable for the payment of attorney's fees in any case, the independence of the judiciary as well as the administration of justice will be severely impaired. The judge qua judge must be free to exercise his considered judgment without apprehension of personal consequences to himself. Additionally, the ability to recruit and maintain a qualified judiciary against the backdrop

of personal or systemic liability for attorney's fees will be cast into serious doubt.

Consequently, the issue of whether the doctrine of judicial immunity bars the award of attorney's fees against judicial officers or the judiciary systems of which they are a part is of vital concern to the Association. The Pennsylvania Bar Association therefore respectfully requests this opportunity to express its views to the Court in the belief such views will present an important and different approach which will be of benefit to the Court in considering the issues raised.

SUMMARY OF ARGUMENT

The Third Circuit Court of Appeals held that Congress intended to abrogate the doctrine of judicial immunity when it passed 42 U.S.C. § 1988. Given the adverse affect this will have on the independence of the judiciary, this Court should review this decision.

The doctrine of judicial immunity serves the important purpose of maintaining the independence of the judiciary. Imposing attorney's fees on judges will do irreparable harm to the doctrine. The very same purposes served by the doctrine warrant insulating judges from awards of attorney's fees.

The Act must be strictly construed as it is in derogation of the common law. Congress did not clearly or expressly intend to abrogate the doctrine of judicial immunity by passing the Act.

ARGUMENT

The Pennsylvania Bar Association is one of the oldest and most distinguished bar associations in the nation. Throughout its long history, the Association has actively lobbied for a strong and independent judiciary while at the same time contributing to the creation of a system of judicial accountability. Although the Association clearly recognizes the strong policy arguments supporting the Civil Rights Attorney's Fees Awards Act, 42 U. S.C. §1988, the Association nevertheless believes that an award of attorney's fees against judicial officers or related state and local agencies will severely undermine the conflicting and even stronger policy requiring independence of the judiciary and, therefore, the administration of justice. Consequently, the Pennsylvania Bar Association respectfully requests that this Court issue a Writ of Certiorari to the Third Circuit Court of Appeals and review and

reverse its judgment in this case.[1]

The holding of the court below clearly goes beyond either the holding or implication of the prior decisions of the Supreme Court. That holding was that the defendant judicial officers were not protected in their judicial actions by judicial immunity from the demand for attorney's fees under 42 U. S. C. §1988.

The doctrine of judicial immunity has been consistenly adhered to by this Court for over a century. In Randall v. Brigham, 7 Wall. 523 (1869), the Court held that a state judge was immune from liability for the alleged wrongful removal of an attorney's name from the rolls of attorneys eligible to prac-

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1 Since a thorough exposition of the factual circumstances of this case as well as the various issues relating to judicial immunity are contained in the Petition for Writ of Certiorari, the Petition is incorporated herein as though fully set forth at length.

tice in that jurisdiction. In Bradley v. Fisher, 13 Wall. 335 (1872), the Court held that a justice of the Supreme Court of the District of Columbia was immune from liability for his judicial acts, even when such acts were in excess of his jurisdiction or alleged to have been done maliciously and corruptly. Later, the Court held that this doctrine of judicial immunity was applicable in suits under §1 of the Civil Rights Act of 1871, 42 U. S. C. §1983, since the legislative record gave no indication that Congress intended to abolish this long established principle. Pierson v. Ray, 386 U. S. 547 (1967). More recently, in Stump v. Sparkman, 435 U. S. 349 (1978), the Court held that a state judge who had sanctioned the sterilization of a retarded woman was immune from liability and that such immunity would be set aside only if a judge acted

in the clear absence of of all jurisdiction.

In Supreme Court of Virginia v. Consumers Union, 100 S. Ct. 1967 (1980), the Court held that the legislative (rule-making) actions of judicial officers qualified for legislative immunity from liability for attorney's fees. In that decision, there is a fleeting and inconclusive reference to the applicability of §1988 to judicial actions. The Court noted that the issue of whether judges are insulated from declaratory or injunctive relief with respect to their judicial acts (as was involved in the instant case) has never been resolved. Id. at 1976. So far as attorney's fees are concerned, the Court suggested that while Congress did not intend to abrogate legislative immunity in promulgating the Act, it did intend for attorney's fees to be awarded against defendants who would be otherwise immune from damages awards citing H. R. Rep. No. 94-1558, 94th

Cong., 2d Sess., 9 (1976). Supreme Court of Virginia, 100 S. Ct. at 1978.

Issuing the Writ of Certiorari to the Third Circuit Court of Appeals will afford this Court the opportunity to decide the troubling issue as to the proper interplay between common law immunities, such as the doctrine of judicial immunity, and §1988.

The doctrine of judicial immunity is deeply rooted in the common law. From the decision of Randall v. Brigham, 7 Wall. 523 (1869), up to the recent decision of Dennis v. Sparks, 49 U.S.L.W. 4001 (1980), this Court has consistently adhered to the doctrine. Essentially, the doctrine reflects an awareness of the necessity of preserving an independent judiciary, totally immune from the fear of vexatious suits and personal liability. Additionally, it reflects the patent unfairness of expecting a judicial officer to freely and fairly render judgment on the

merits of any given case where he may be personally and financially responsible according to the judgment of others far removed from the normal system of judicial review.

> "This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necesssarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts."

Randall v. Brigham, 7 Wall. 535-36.

> "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly de-

> termined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility."

Bradley v. Fisher, 13 Wall. 348.

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decidion-making but to intimidation."

Pierson v. Ray, 386 U.S. at 554.

These quotations are illustrative only, and are by no means exhaustive.

What threat or challenge is sufficient to influence the independent conscience of a judge? Surely the threat or promise of criminal prosecution or civil damages against him personally would intrude into that conscience. Is the trans-

fer of the liability for damages to the judge's supporting administrative office or judicial system any viable insulation? Is there any measurable difference where the dollars are designated "damages," or "costs" or "attorney's fees?"

Judicial immunity is predicated not only on the need to immunize individual judges but the judiciary as a whole. The two are inextricably bound together. A judge's independence will be no less impaired if the system of justice of which he is an integral part bears the ultimate financial liability for his actions. Mere knowledge of taxing such a cost upon the system would play subtly upon any judge's exercise of his responsibilities.

It has been suggested that judicial immunity is predicated in part on "the notion that private rights can be sacrificed in some degree to the achievement

of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights." Stump v. Sparkman, 435 U.S. at 370-71, (dissenting opinion). There is no question that the indigent criminal defendants involved in this case were not foreclosed from the normal judicial process so far as redress of the alleged wrongs were concerned and that various avenues for doing so were open to them. Separate and apart from these judicial avenues for redress, the system of judicial inquiry and review that has been erected in the Commonwealth of Pennsylvania (see Petition for Writ of Certiorari) insures judicial accountability while safeguarding the integrity and independence of the judiciary.

Is judicial immunity simply an outmoded vestige of the immunity enjoyed by kingly sovereigns? Is it worth preserving? The Pennsylvania Bar Associa-

tion is firmly convinced that there are some elements of America's peculiarly complex form of democratic government which are critical to its survival. A realistic system of checks and balances among the three branches of government is one such element. Another is the effective independence of the judiciary.

We firmly believe the abrogation or dilution of judicial immunity by making judges accountable for attorney's fees will have an impact which is not just chilling but, indeed, freezing on the performance of judges and the judicial system of which they are a part. If this Court concludes that the doctrine of judicial immunity has no application to the award of attorneys fees in this case or that the doctrine has been abrogated to some extent, it will do so only at the expense of the strong policy arguments which this Court has consistently enunciated for over a

century. To do so, this Court must examine the origin and purposes of the Act. It is therefore important that this Court carefully examine the Act in question and, in weighing the intent behind it, carefully balance the full impact of the competing policies.

The Civil Rights Attorney's Fees Awards Act, being in derogation of the common law, must be strictly construed, for "no statute is to be construed as alternating from common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." Shaw v. North Pennsylvania Rail Co., 101 U. S. 557, 565 (1880), quoted in Herd & Co. v. Krawill Machine Corp., 359 U. S. 297, 304-05 (1959). This Court has applied this rule with reference to the issue of judicial immunity. In Pierson v. Ray, supra, the Court concluded that judges remained immune from

damage liability under 42 U.S.C. §1983.

> "The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities... .The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

386 U. S. at 354-55 (citations and footnotes omitted). Confronted with the question of whether the Act abrogated the immunity of judges with respect to their legislative function, the Court held in Supreme Court of Virginia v. Consumers Union, supra, that, absent an express indication to the contrary, Congress cannot be presumed to have changed the common law rule.

In the present case, the Court of Appeals relied on the House Report to conclude that Congress expressly considered judicial immunity and decided to abrogate it under the Act. H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 2. The House Report states:

"Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, civil and constitutional rights are to be adequately protected."

Id. at 9. The Court noted in particular that since one of the three cases cited in footnote 17 was Pierson v. Ray, supra, Congress clearly must have intended to abrogate the doctrine of judicial immunity.

Reliance on this isolated reference by the Circuit Court is at variance with the holding of this Court in Supreme Court of Virginia v. Consumers Union, supra. The legislative reference suggests an intent to make public officials liable for counsel fees where any immunity from damages exists. (Did they really mean to encourage suits without remedy-damages-by providing ready-made counsel fees?) But this Court, after noting the legislative reference, concluded

there was no evidence of legislative intent to award counsel fees in the face of legislative immunity. Nor is there a compelling reason to apply the remedy of counsel fees in derogation of judicial immunity.

It is improbable that Congress intended to abrogate these immunities and special defenses by such a vague and nebulous reference. The Congressional Record for this statute may be searched in vain to find any reference to the doctrine of judicial immunity. The Senate Report, S. Rep. No. 94-10011, 94th Cong., 2d Sess. 1, 1976, U. S. Code Cong. & Admin. News 5908 et seq., makes no reference to the doctrine of judicial immunity or any other immunity. Notably, it was the Senate version of the Act which ultimately passed. There are references throughout the debate in both the House and the Senate to the question of assessing attorney's fees against state and local officials. No

reference was made, however, to judges acting in their judicial capacities.

This is in marked contra-distinction to the abundance of references in the Congressional Record to the doctrine of judicial immunity which appeared in the debates surrounding 42 U. S. C. §1983. Pierson v. Ray, 386 U.S. at 559-63 (dissenting opinion). In the face of the specific references to judges being held liable for damages under §1983 in the Record, this Court concluded that there was no clear statement of Congressional intent to abrogate the doctrine of judicial immunity.

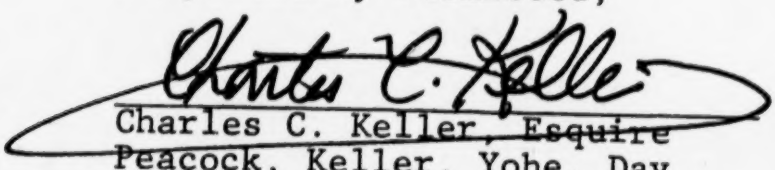
If the doctrine of judicial immunity is to be abrogated to any extent, Congress should do so expressly and by specific reference. Its failure to do so in the Act itself, viewed in the absence of any substantial or meaningful discussion of the doctrine or its purposes, makes it clear that Congress did not intent to abrogate

the doctrine. By issuing a Writ of Certiorari to the Third Circuit Court of Appeals, this Court will have the opportunity of resolving this compelling and timely issue once and for all.

CONCLUSION

The Pennsylvania Bar Association respectfully requests this Court to issue a Writ of Certiorari to the Third Circuit Court of Appeals and review its judgment and opinion.

Respectfully submitted,



Charles C. Keller, Esquire
Peacock, Keller, Yohe, Day
& Ecker
70 East Beau Street
Washington, Pennsylvania 15301

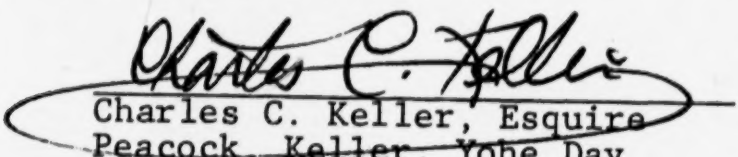
Attorneys for the Pennsylvania
Bar Association

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 1980, three copies of the within Motion and Brief were mailed, postage prepaid, to the following parties in accordance with the applicable Rules of the Supreme Court:

Thomas W. Pomeroy, Jr., Esq.
Kirkpatrick, Lockhart, Johnson
& Hutchison
1500 Oliver Building
Pittsburgh, Penna. 15222
Attorney for Petitioners

Timothy P. O'Brien, Esq.
Neighborhood Legal Services
Association
10th Floor
Allegheny Building
429 Forbes Avenue
Pittsburgh, Penna. 15219
Attorney for Respondents



Charles C. Keller, Esquire
Peacock, Keller, Yohe Day
& Ecker
70 East Beau Street
Washington, Penna. 15301
Attorney for Pennsylvania
Bar Association

December 8, 1980